U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: AUGUST 5, 1999

DATE:

CASE NO.: 1999-INA-102

In the Matter of:

BENTLEY HARRIS, INC.
Employer,

on behalf of

CATY MARIE BUISINE
Alien.

Appearance: Marshal E. Hyman, Esq.
For the Employer/Alien

Certifying Officer: Richard E. Panati, Pennsylvania

Before: Holmes, Lawson & Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arises from an application for labor certification[1] filed by Bentley Harris, Inc., a Protective Sleeving Company, for the position of Business Analyst. (AF 38).[2] The Certifying Officer (CO) denied certification on the ground that U.S. workers were rejected for other than lawful, job-related reasons, in violation of 20 C.F.R. 656.21(b)(6) and that 20 C.F.R. 656.20(c)(8)

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[1] Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File."

was also violated, in that the job opportunity did not appear to be clearly open to any qualified U.S. worker.

The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file (AF), and any written argument of the parties. §656.27(c).

STATEMENT OF THE CASE

On November 10, 1997, Employer filed the above-referenced application for labor certification. (AF 38). On August 12, 1998, the CO issued a Notice of Findings (NOF) proposing to deny certification based on the Employer's rejection of U.S. workers who appeared to be qualified for the position. (AF 33-34). The CO noted that Employer received 34 responses from U.S. workers, the majority of whom appeared to possess the qualifications required, and yet Employer sent each applicant a letter requesting (1) proof of an MBA in financing or marketing; (2) proof of two years of experience as a financial analyst in the form of a letter from a past Employer; and (3) proof of legal authorization to work in the United States on a permanent basis. (AF 34).

The CO found the information and documentation requested of U.S. workers to be excessive, burdensome, and indicative of a lack of good faith recruitment. (AF 34). The CO pointed to the fact that 24 of the 34 applicants failed to respond to Employer's letter, as proof that it did have a chilling effect on U.S. applicants. (AF 34). The CO stated that when an applicant's resume indicates that he or she meets the minimum job requirements or indicates a degree of experience, education and training which likely qualify the applicant for the position, the Employer bears the burden of interviewing the applicant to determine whether the applicant is in fact qualified for the job opportunity. (AF 34). The CO also noted that proof of legal right to work in the United States may not be requested until a hiring decision is made, and cannot be made a condition precedent to an employment interview. (AF 34). Employer was directed to prove that the U.S. workers were not able, willing, qualified or available for this job opportunity. (AF 34).

Under cover letter from counsel dated September 10, 1998, Employer submitted its rebuttal, contending that it believed that its actions at all stages of the labor certification process were done in good faith and that none prevented qualified U.S. workers from pursuing their applications. (AF 27-31). Specifically, Employer argued that its follow-up letter to request documentation regarding the qualifications and status of U.S. workers should not be construed as discouraging in any way, and that it had a right to request the information, and to request a copy of an applicant's degree and proof of work, since statements made in a resume in no way verify an individual's qualifications. (AF 30). Employer argued that it was fully reasonable to send every applicant a certified letter requesting such documentation. (AF 30). Employer attached a page from the State agency instructions as evidence of its right to advertise that applicants must have proof of eligibility to work in the United States. (AF 32). Those instructions advised that it was

acceptable to state “Must have proof of legal authority to work in the U.S.” in advertisements. (AF 32).

On September 25, 1998, the CO issued the Final Determination (FD) denying certification on the ground that U.S. workers were rejected in violation of 20 C.F.R. §656. (AF 24-26). The CO rejected the Employer's arguments and determined that the Employer did not engage in good faith recruitment of U.S. workers. (AF 26). The CO did not accept the State agency instructions relied upon by the Employer as justification of its requirement that applicants provide proof of their right to work in the United States, as the issue was whether an Employer could require an applicant to produce proof of the legal right to work in the United States prior to the employment interview, not whether an Employer may ever request such proof or whether the employment ads could not contain statements advising hires that such proof would be required at some point during the recruitment/selection process. (AF 26).

By letter dated October 26, 1998, Employer requested reconsideration of the denial by the CO. (AF 14-17). On October 29, 1998, that request was denied by the CO. (AF 12). On November 9, 1998, Employer requested review by the administrative-judicial review. (AF 1). This matter was forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board") on November 16, 1998. After receiving an extension of time until March 1, 1999, in which to file a legal brief or statement of position, Employer submitted its Statement of Position on February 24, 1999.

DISCUSSION

The issue present by the appeal is whether the Employer engaged in good faith recruiting of U.S. workers. Employer argues that it requested information reasonable and relevant to the labor certification inquiry, and nothing in its request for additional information was overly burdensome. The CO found otherwise.

Where a U.S. applicant's resume reveals that he or she clearly lacks the minimum specified job requirements, that applicant may be rejected without an interview, *ENY Textiles, Inc.*, 1987-INA-641 (Jan. 22, 1988), at least in the absence of additional relevant information from other sources or a reasonable request by the CO that the applicant be interviewed. *See Anonymous Management*, 1987-INA-672 (Sept. 8, 1988)(*en banc*). However, where an applicant's resume indicates a broad range of experience, education and training such that it is reasonably possible that she is qualified for the job, an Employer has an obligation to further investigate that applicant's credentials by interviews or otherwise. *Gorchev & Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990)(*en banc*).

In the instant case, Employer argues that it did just that by sending out certified letters wherein it indicated to applicants that it had received his/ her resume, and that before an interview could be scheduled, documentation verifying the education and experience required for the job was necessary. (AF 29-30). Specifically, Employer requested every applicant to submit within two weeks from the date of its letter (1) proof of an MBA; (2) proof of two years of experience as a financial analyst in the form of a letter from an Employer; and (3) proof of legal authorization to work in the United States.

In *Berg & Brown, Inc.*, 1990-INA-481 (Dec. 26, 1991), it was determined that Employer's request for a portfolio and references prior to an interview of a seemingly qualified applicant was "unusual" and "dilatory" and had the effect of discouraging applicants. In the instant case, Employer's letters to thirty-four seemingly qualified applicants had the same effect. A review of the resumes of these applicants made it reasonably possible that they were qualified for the job. An interview would have been the next step, not a form letter requesting the "verification" as sought by Employer herein. This requirement by Employer had a chilling effect, discouraging U.S. applicants from pursuing the position.

In sum, once it was apparent that several of the U.S. applicants had the qualifications sought by Employer, it was incumbent upon the Employer to interview these applicants. Instead, Employer sent an additional letter to these applicants requesting information not usually sought prior to an interview. This request resulted in the majority of the U.S. applicants failing to pursue the position. The CO correctly determined that this requirement had a chilling effect on U.S. applicants. Therefore, the CO's decision will be affirmed.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

SO ORDERED.

For the Panel

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.